Is the doctrine defensible on principle? It is clear that the testator's duly expressed intent to create this result must be carried out unless so doing would disregard some principle of law or public policy. The question then becomes: is there such a rule of policy interposed here? The whole tendency of the law has been toward the removal of old restraints on alienation, and the disallowance of new ones.[10] The only retrogressive movement has been the confirmation of spendthrift trusts, and these are opposed to the fundamental principle of the common law that it is against public policy that a man "should have an estate to live on but not an estate to pay debts with." [11] *Claflin* v. *Claflin* marks a second reactionary step; hence its supporters must justify its departure from the general rule. Where the doctrine has been adopted, the courts have admitted that the interest of the legatee remains alienable.[12] If a creditor or transferee of the *cestui's* interest is permitted to gain possession of the property forthwith, the restraint is purely formal, since the legatee can get possession by the simple process of assigning and accepting a reassignment. But if the restriction is strictly enforced, a disposition of the property at a fair valuation becomes more difficult, thus exposing the legatee to those one-sided bargains which the testator sought to prevent, and against which equity has always sought to protect *cestuis*.[13] It is admitted by advocates of the rule [14] that some limit must be placed upon the duration of the postponement, but no satisfactory limitation has as yet been evolved by the courts.[15] The adoption of any rule governing the duration will mark the introduction of a new confusing element into a branch of the law already overburdened with an inheritance of technicalities. It is submitted, therefore, that this exception, which neither affords any particular advantage, nor corrects a preëxisting defect in the law, but tends only to confusion, should be rejected.

CAN A STATE ABOLISH INSANITY AS A DEFENSE IN CRIMINAL PROSECUTIONS. — The Supreme Court of the State of Washington, in the recent case of *State* v. *Strasburg*, 110 Pac. 1020 (Wash.), answered this question in the negative. The case appears to be quite unprecedented. The decision held that the statute in question [1] violated the provisions of the state constitution that, (1) "No person shall be deprived of life, liberty, or property without due process of law," [2] and (2), "The right to trial by jury shall remain inviolate." [3]

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have statutory regulations preventing the adoption of the rule. See GRAY, RESTRAINTS ON ALIENATION, 2 ed., § 280.

[10] See GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 98; Edgerly *v.* Barker, 66 N. H. 434, 454.

[11] See Tillinghast *v.* Bradford, 5 R. I. 205, 212.

[12] Claflin *v.* Claflin, *supra*, 23.

[13] See GRAY, RESTRAINTS ON ALIENATION, 2 ed., § 124 *m*, *n*.

[14] See KALES, FUTURE INTERESTS, § 293.

[15] See 19 HARV. L. REV. 604; 20 *id.* 202; GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 121 *i*.

[1] REMMINGTON & BALLINGER'S CODE, (Wash.) § 2259.

[2] WASH. CONST., Art. I, § 3.

[3] WASH. CONST., Art. I, § 21. There are similar provisions in practically all state constitutions. See STIMSON, FEDERAL AND STATE CONSTITUTIONS, 170–172.

The exact confines of the power conferred upon the judiciary to curb legislative action because it denies someone due process of law, are even yet not exactly marked out. The phrase itself is incapable of precise definition,[4] and the decisions under it are not wholly consistent, the inconsistency being due in part to failure to distinguish "due process of law" from "equal protection of the laws." The same court that decided the *Union Transit* case [5] might well be willing to extend its power to cover this one. The phrase does not, however, restrict the machinery of the states to preëxisting institutions.[6] The cases incline toward the doctrine that the inhibition is directed toward arbitrary procedure in the course of the trial, rather than toward changes in the substantive law of crime.[7] Though courts must necessarily consider what is reasonable in defining "arbitrary procedure" and "equal protection of the laws," it does not follow that they may question the reasonableness of legislative enactments that apply uniformly to every person in the community, and violations of which are to be tried by a regular jury. The law in question is undoubtedly a great departure from previous criminal legislation and cannot be justified as "due process" on the ground of "ancientness." Yet after all, is it not the special province of the legislature to define crime? One queries whether the court has not inadvertently followed the erroneous doctrine first laid down in Coke's *dictum*,[8] but long since discredited,[9] that a court can nullify a statute merely because it seems to the court unjust, unreasonable, and oppressive.[10]

Of course the legislature did not really intend to abolish the defense altogether. It merely desired to prevent the abuse of it. Could that result be accomplished by giving the matter over to the exclusive consideration of the judge, or a lunacy commission? The answer must depend upon the question of the state's power to abolish it completely. Here we must notice the distinction between the trial of insanity merely as prefatory to commitment to an asylum, and the trial of the same question when set up in answer to a criminal charge. In the former case no jury is necessary.[11] In the latter the question of insanity is a

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[4] Davidson *v.* New Orleans, 96 U. S. 99.

[5] Union Transit Co. *v.* Ky., 199 U. S. 194. *Held*, unreasonable exercise of the taxing power to tax citizens on personalty permanently located outside the state. So too, it has been *held* an unreasonable exercise of the police power to prohibit the sale of liquor, so far as the act applied to liquor already existing within the state. Wynehamer *v.* The People, 13 N. Y. 378. See Mugler *v.* Kansas, 123 U. S. 623, 661, 678.

[6] Hurtado *v.* California, 110 U. S. 516.

[7] The test most frequently quoted is that laid down by Webster. See Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 581; COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW, 243, 244.

[8] 8 Rep. 118 a. Note to Paxton's Case, Quincy (Mass.), Appendix I, 520.

[9] See THAYER, CASES ON CONSTITUTIONAL LAW, 48, n.

[10] It is suggested that the law might have been attacked upon a ground not mentioned in the principal case, namely, that the infliction of the full penalty upon one incapable of comprehending the nature of his act is a punishment so shockingly excessive as to be both "cruel and unusual." WASH. CONST., Art. I, § 14. State *v.* Driver, 78 N. C. 423. See Weems *v.* United States, 217 U. S. 349. See 24 HARV. L. REV. 54. Practically all state constitutions contain this prohibition. See STIMSON, FEDERAL AND STATE CONSTITUTIONS, 181.

[11] But there must be a fair trial. Van Deusen *v.* Newcomer, 40 Mich. 90. State *v.* Billings, 55 Minn. 467. *In re* Boyet, 136 N. C. 415.

question of fact upon which the guilt or innocence of the accused depends. It is as much a question of fact as the question of his physical presence at the act itself. The right to trial by jury must imply the right to have the jury pass upon every question of fact material to the decision. Otherwise a hostile legislature might withdraw from their consideration one issue after another until the whole institution became reduced to a hollow shell.[12] The complete abolition of the defence would make the question of insanity wholly irrelevant. It might then be tried as an independent matter by any proper authority. But under the doctrine of the principal case that is not due process of law, and matters must stand practically as they now are.

MURDER OF THE INSURED BY THE BENEFICIARY. — The maxim that no man can take advantage of his own wrong does not in itself afford a complete answer to a murderer's contention that his crime ought not to affect his property rights.[1] Where a husband or wife, having murdered the other, has sought to take under the unconditional terms of the statutes relating to descent, dower and devises, the earlier cases frankly read exceptions into these statutes.[2] But the later decisions have made no exception and allow the murderer to take the legal title free from equities;[3] for the suggestion that a constructive trust arises in favor of the next in line of inheritance has not been adopted by the courts.[4]

But when the murderer has claimed as beneficiary of an insurance contract no difficulty has been felt in flatly refusing assistance.[5] For it is well recognized that the interest of a beneficiary is essentially equitable; that he is the *cestui que trust* of the insured, who holds the obligation of the insurer in trust for him.[6] Statutes and decisions that allow the beneficiary to sue in his own name do not change the essential characteristics of this relationship.[7] And since the beneficiary cannot come into court with clean hands, he is not entitled to relief. A recent Ohio case has properly refused to allow a recovery by the beneficiary. *Filmore* v. *Metropolitan Life Insurance Co.*, 92 N. E. 26 (Oh.). But the reasoning of the court is not conclusive, for it places its decision upon the ground

[12] See BLACK, CONST. LAW, 2 ed., 519.

[1] Box *v.* Lanier, 2 Tenn. Ch. App. 1; Perry *v.* Strawbridge, 209 Mo. 621.

[2] Shellenberger *v.* Ransom, 47 N. W. 700 (Neb.); Riggs *v.* Palmer, 115 N. Y. 506 (devise). See 4 HARV. L. REV. 394; Perry *v.* Strawbridge, *supra* (a murderer of his wife is not a "widower" within the statute).

[3] Wellner *v.* Eckstein, 101 Minn. 444 (statutory dower); *In re* Carpenter's Estate, 170 Pa. St. 203; Owens *v.* Owens, 100 N. C. 240 (statutory dower — statute subsequently amended); Shellenberger *v.* Ransom, 59 N. W. 935 (Neb.); McAllister *v.* Fair, 72 Kan. 533; Kuhn *v.* Kuhn, 125 Ia. 449; Gollnik *v.* Mengel, 128 N. W. 292 (Minn.).

[4] Dean Ames advanced this view in 8 HARV. L. REV. 170. In Kuhn *v.* Kuhn, *supra*, it was passed upon by the court and rejected. A constructive trust arises only in favor of one who has suffered, the next in line of inheritance is seeking only a windfall.

[5] Schmidt *v.* Northern Life Association, 112 Ia. 41; New York Life Insurance Co. *v.* Davis, 96 Va. 737; Schreiner *v.* High Court C. O. of F., 35 Ill. App. 576.

[6] Cleaver *v.* Mutual Reserve Fund Ass., [1892] 1 Q. B. 147. This is the leading English case on this subject.

[7] The cases in which the contract is made directly between the insurer and the beneficiary upon the life of a third person are obviously not here considered.